United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B
P/S

74-1468

United States Court of Appeals

For the Second Circuit

Docket No. 74-1468

(T-3378)

THOMAS I. FITZGERALD, Public Administrator of the County of New York Administrator of the Estate of HAGEN PASTEWKA, Deceased, and MONICA PASTEWKA, Individually,

Plaintiffs-Appellants,

—against—

TEXACO, INC. and TEXACO PANAMA, INC.,

Defendants-Appellees.

and Consolidated Cases.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLANTS THOMAS I. FITZGERALD, FOR "DEATH CLAIMANTS"

HARVEY GOLDSTEIN
and
FUCHSBERG & FUCHSBERG
Attorneys for Appellants
Thomas I. Fitzgerald, as
Administrator for Estate, etc.
250 Broadway
New York, N.Y. 10007

HARVEY GOLDSTEIN
On the Brief.

only copy available

TABLE OF CONTENTS

PAGE

CITATIONS

CASES

STATUTES

TEXT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

THOMAS I. FITZGERALD, Public Administrator of the County of New York, Administrator of the Estate of HAGEN PASTEWKA, deceased, and MONICA PASTEWKA, individually,

Plaintiff,

-against-

TEXACO, INC. and TEXACO PANAMA, INC.,

Defendants.

----------X

Docket No. 74-1468
(T-3378)

DEATH CLAIMANTS' BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

THE ISSUES PRESENTED FOR REVIEW

1. This matter being predicated upon the Death on the High Seas Act, 46 U.S.C. 761, et seq., as well as upon the general maritime law of the United States, did the Court below err and abuse its discretion in declining to provide the death claimants with a more knowledgeable local forum, familiar with and better able to interpret and apply the statute, and in compelling them to institute suit in a foreign jurisdiction unfamiliar with the statutory law of the United States and its intracacies and its applicability to the facts herein.

2. Did the Court below abuse its discretion in dismissing this matter in refusing to permit the plaintiffs to conduct discovery proceedings (other than to obtain answers to six interrogatories and the production of one document) to give the

plaintiffs an opportunity to answer the defendants' motion by conducting an inquiry into the defendants' base of operations, to show the Court that New York and its witnesses was the primary source of the material, relevant evidence in the case.

3. Did the Court below abuse its discretion in dismissing this matter without demanding from the defendants that they identify the probable English witnesses having knowledge of the facts, their availability and willingness to testify and the substance of their testimony.

STATEMENT OF THE CASE

This brief on appeal by the estates of the deceased seamen of the Brandenburg (hereinafter referred to as the death claimants), in consort with that of the Brandenburg's hull and cargo claims, is from the final order of the United States District Court for the Southern District of New York, Honorable Charles M. Metzner, dated March 26, 1974, which simply adopted, in toto, the opinion and suggestion in the final report of Magistrate Martin D. Jacobs, submitted January 23, 1974, that all complaints in these consolidated actions should be dismissed on the basis of forum non conveniens, on condition that (1) defendants submit to the jurisdiction of the English Courts; and (2) waive any Statute of Limitations defenses as to any claim against them.

STATEMENT OF THE FACTS

The facts as set forth by Brandenburg in its brief also reflect the death claimants' understanding of them.

ARGUMENT

POINT I

THE COURT BELOW ERRED IN DECLINING AND FAILING TO PROVIDE THE DEATH CLAIMANTS WITH A MORE KNOWLEDGEABLE LOCAL FORUM, FAMILIAR WITH AND BETTER ABLE TO INTERPRET AND APPLY THE DEATH ON THE HIGH SEAS ACT, 46 U.S.C. 761, et seq., AND IN COMPELLLNG THEM TO INSTITUTE SUIT IN A FOREIGN JURISDICTION UNFAMILIAR WITH THE STATUTORY LAW OF THE UNITED STATES, ITS SUBTLETIES AND ITS APPLICABILITY TO THE FACTS HEREIN.

The death claimants' suits are predicated upon the Death on the High Seas Act, 46 U.S.C. 761, et seq., and upon the non-statutory general maritime law of the United States. Both are applicable herein. A United States corporation is subject to the law of its own corporate structure. As such, Texaco is subject to the United States law.

And, as will hereinafter be discussed, the same rule of law applies to Texaco Panama (hereinafter referred to as Texpan).

A motion for dismissal grounded upon the doctrine of forum non conveniens was discussed at length in Gulf Oil v. Gilbert, 330 U.S. 501, wherein the Supreme Court said that only in "rare cases ... the doctrine should be applied", the rule given as follows:

> "The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex, harass or oppress' the defendant by inflicting upon him expense or trouble not necessary to his

own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." (Emphasis added)

Norwood v. Kirkpatrick, 349 U.S. 29, characterized its use as limited, as follows:

"That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation....." (p.32) (Emphasis added)

And in The Belgenland, 114 U.S. 355, 365 (1885):

"But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are communis juris, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged." (Emphasis added)

* * * * * * * * * * * * * * * * *

"The subject has frequently been before our own admiralty courts of original jurisdiction, and there has been but one opinion expressed, namely, that they have jurisdiction in such cases, and that they will exercise it unless special circumstances exist to show that justice would be better subserved by declining it."

This Court emphatically agreed in Kloeckner v. A/S Hakedal, 210 F.2d 754, 756:

"If the defendant would avoid the suit, he must show that he will be unfairly prejudiced, unless [the suit] be removed to some other jurisdiction".

In Motor Distributors v. Olaf Pedersen's, 239 F.2d 463(5C), the Court stated:

> "...the rule is, ... that jurisdiction should be taken unless to do so would work an injustice."

In Heredia v. Davies, 12 F.2d 500 (4C), the Court declared that:

> "While an admiralty court of the United States is under no obligation to entertain jurisdiction of a libel to recover for personal injuries where libellant is a foreigner and the ship is a foreign ship, it is inclined to do so when (as in this case) it is necessary to prevent a failure of justice, or when the rights of the parties would be thereby best promoted."

See also: Gkiafis v. SS YIOSONAS, 387 F.2d 460 (4C); FLETERO v. Arias, 206 F.2d 267 (4C); Norris, "The Law of Seamen", 3rd Ed., Vol. 1, §7, pages 16, 17.

It is death claimants' contention that for the purpose of lowering its overhead, Texaco created Texpan in Panama as a wholly owned, totally controlled, subsidiary governed by Texaco from its New York office, controlling its vessels and chartering them to provide the coordination of movement of its oil tankers in its overall business plan to supply its oil for refining and sale around the world.

And as stated in Statement of the Facts (Brandenburg brief), the control of the Texaco empire was governed from New York to such extent that TOT could not authorize Smit-Tak to locate and mark the sunken hull sections of the TEXACO CARIBBEAN

without approval from Texaco/New York. That is the major thrust of this suit by both death claimants and Brandenburg.

It is because of Texaco's location in New York and jurisdiction over it that the suits were brought in the Court below, both against Texaco and its wholly owned and controlled foreign subsidiary, Texpan, with Texpan's flag of convenience ship.

Death claimants should not be compelled to start again in England. Whether the Death Act, supra, will be accepted or applied in England is unknown and is most likely a matter of discretion with the British Court. At best, there will be a suit under United States law against Texaco, the United States corporation and Texpan (under United States law likened to a United States corporation). Will the English Courts apply the same concept and liken Texpan to a United States corporation for purposes of applicability of the Death Act? And, in any event, there is the specter of a foreign forum applying United States law in a claim against United States defendants - the reverse situation wherein United States Courts uniformly decline jurisdiction and require claimants to return to the forum of the applicable law for trial, Fitzgerald v. Westland, 369 F.2d 499 (Japanese and Canadian law); Spencer v. Alcoa, 221 F.Supp. 343, aff'd. 324 F.2d 957 (Jamaica); Domingo v. States Marine, 340 F.Supp. 811 Philippine); Garis v. Compania, 386 F.2d 155 (2C) (Greek); Scognamiglio v. Home, 246 F.Supp. 605 (Italian); Hatzoglou v.

Asturias, 193 F.Supp. 195 (Greek); Poutos v. Mene Grande, 123 F.Supp. 577 (Venezuela); DeSairigne v. Gould, 83 F.Supp. 270, aff'd. 177 F.2d 515 (2C) (France).

The standard created by this Court for dismissal under the doctrine of forum non conveniens to be herein applied was not met by the Magistrate and the Court below. There was a total failure to give weight to and consider that United States statutory law was applicable, as indicated by the Magistrate's opinion (360a of the appendix), and the fact that a factor of such magnitude was not even considered is a clear indication that error was committed.

Consider the more frequent number of cases involving Jones Act suits by foreign seamen against foreign shipowners controlled by American interests. Hellenic Lines v. Rhoditis, 398 U.S. 306, expressed the thought that the jurisdictional test be considered in light of the national interest, primarily the shipowner's base of operations. The foreign owner of a foreign-flag ship was held to be responsible under the Jones Act and in favor of the Greek seaman-plaintiff because of the shipowner's long association and residence in the United States.

Pressing beyond the facade of the foreign flag and applying the Jones Act, the leading case of Bartholomew v. Universe Tankships, 263 F.2d 437, by this Court, stated, at page 442:

"Although appellant contends otherwise, the practice in this type of case of looking through the facade of foreign registration and incorporation to the American ownership behind it is now well established. Gerradin v. United Fruit Co., 2 Cir., 1932, 60 F.2d 927, certiorari denied 287 U.S. 642, 53 S.Ct. 92, 77 L.Ed. 556; Carroll v. United States, 2 Cir., 1943, 133 F.2d 690; Zielinski v. Empresa Hondurena de Vapores, D.C.S.D.N.Y. 1953, 113 F.Supp. 93; Torgersen v. Hutton, 2nd Dept. 1934, 243 App.Div. 31, 276 N.Y.S. 348, affirmed, 1935, 267 N.Y. 535, 196 N.E. 566, certiorari denied, 1935, 296 U.S. 602, 56 S.Ct. 118, 80 L.Ed. 426. This is essential unless the purposes of the Jones Act are to be frustrated by American shipowners intent upon evading their obligations under the law by the simple expedient of incorporating in a foreign country and registering their vessels under a foreign flag. See Lauritzen, 345 U.S. at page 587, 73 S.Ct. at page 930. In the case now before us appellant has taken the trouble to insert an additional nominal foreign corporation between the flag and the true beneficial ownership of the vessel. But we have little difficulty in brushing all this aside when considering the applicability vel non of the Jones Act. Complicating the mechanics of evasive schemes cannot serve to make them more effective. What we now do is not to disregard the corporate entity to impose liability on the stockholders, but rather to consider a foreign corporation as if it were an American corporation pursuant to the liberal policies of a regulatory act. See Zielinski v. Empresa Hondurena de Vapores, supra, 113 F.Supp. at page 95."

In the case at bar, Texaco, the primary defendant, is a United States corporation based in New York and created a wholly owned subsidiary in Panama to hold paper ownership of Texaco vessels chartered back to Texaco by the subsidiary to carry Texaco's oil. Surely, the shuffling of corporate owner-

ships should not be used to deprive claimants, including widows and children, of their day in the forum where the American defendant conducts and controls its business. As the Supreme Court in Rhoditis could see no reason whatever to give the Jones Act a strained construction, creating an advantage for the alien owner engated in an extensive business operation in this country over citizens engaged in the same business, nor should this Court permit the destruction of this suit by compelling the death claimants to go to a forum where English law is less favorable to them, where the applicability of the statutory United States law would be extinguished or, even if accepted, would be administered by a foreign forum far less familiar with the statute and its nuances with the law and its interpretations by our United States Courts.

Zielinski v. Empresa, 113 F.Supp. 93 (DCNY), held that a suit by an alien seaman against a foreign shipowner corporation, foreign registered, the stock of said corporation owned by an American corporation, would make American law applicable, as follows:

> "That decision would be authority for the application of the Jones Act in the case at bar if the Orotava here had been owned directly by the United Fruit Company instead of being owned by Empresa, a Honduran corporation all of whose shares were, in turn, owned by the United Fruit Company. I do not think that the distinction makes a difference. The Court is not asked to cast liability upon the United Fruit Company by ignoring the corporate existence of Empresa. It is asked to cast liability upon Empresa as though it were a United States, rather than a Honduran,

> corporation. There is in the statute involved in Central Vermont Transp. Co. v. Durning, 294 U.S. 33, 55 S.Ct. 306, 79 L.Ed. 741, an expressed legislative policy that for the purposes of that statute a ship owned by a United States corporation shall not be treated as a United States ship. It is my belief that the court should give effect to the nationality of the actual control of the ship, particularly in a case like this where the claimant is domiciled in the United States". (p.95)

The Zielinski decision was cited with approval by this Court in Barthelomew v. Universe Tankships, supra.

The Court will accept jurisdiction where it appears that American citizens or corporations have a controlling interest in the foreign-flag vessel or the corporation or company that owns it. In Pavlou v. Ocean Traders, 211 F.Supp. 320, 325 (DCNY), the Court suggested that the shipowner's base of operation was a factor to be considered in determining whether there was sufficient connection with the United States to afford the seaman the advantages of American law. The Pavlou case was cited with approval by this Court,also by the Court of Appeals for the 5th Circuit and the Supreme Court of the United States in Hellenic v. Rhoditis, 412 F.2d 919, aff'd 398 U.S. 306.

In Central Vermont v. Durning, 294 U.S. 33, the Court stated its policy to look beyond the official corporate ownership to give effect to the nationality of the actual control of vessels in cases where some parties were domiciled in the United States (Texaco herein with its principal place of business

in New York City).

Lauritzen v. Larsen, 345 U.S. 571, expressed the thought that the Courts should and will look past foreign registration to enforce American law against American shipowners.

> "But it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries (23). Confronted with such operations, our Courts on occasion have pressed beyond the formalities of more or less minimal foreign registration to enforce against American shipowners the obligations which our law places upon them." (24)

In Tsakonites v. Transpacific, 246 F.Supp. 684 (DCNY), the Court again searched for the base of interest by the beneficial owner in these words:

> "While each case must be decided on its own facts, these cases teach that beneficial ownership and control of the vessel by American citizens or corporations will be given legal significance despite schemes, however complex or imaginative, to avoid American laws through the formalities of foreign registration and operation. See also: Southern Cross S.S. Co. v. Firipis, 4 Cir. 1960, 285 F.2d 651, 84 A.L.R.2d 895 cert. denied, 1961, 365 U.S. 869, 81 S.Ct. 903, 5 L.Ed.2d 859; Bobolakis v. Compania Panamena Maritima San Gerassimo, S.A., S.D.N.Y., 1958, 168 F.Supp. 236; and Zielinski v. Empresa Hondurena de Vapores, S.D.N.Y., 1953, 113 F. Supp. 93."

See also: Repouskos v. Asturia, 240 F.Supp. 124, aff'd 410 F.2d 399 (2C); Burie v. Overseas, 205 F.Supp. 182, aff'd 323 F.2d 873 (2C); Gerradin v. United Fruit, 60 F.2d 927 (2C); Lekkas v. M/V CALEDONIA, 443 F.2d 10 (4C); Agrio v. Oceanic,

204 F.Supp. 10 (DCNY); Groves v. Universe, 308 F.Supp. 826 (DCNY); Voyiatzis v. National, 199 F.Supp. 920; Yee Ying Ching v. M/V MARTHA ENDEAVOUR, 301 F.Supp. 809.

The Rhoditis case involved statutory American law, the Jones Act. The death claimants herein are seeking similar jurisdictional relief under the Death Act. If it were foreign seamen from the sunken TEXACO CARIBBEAN who sued their employer, the paper owner, controlled by Texaco, is there any doubt but that the Jones Act would be held applicable in light of the Rhoditis case and others set forth above. And is there any doubt but that the American jurisdiction would be retained to apply American law against American defendants.

Indeed, Rhoditis, supra, holding that a base of operations in the United States was a sufficient connecting factor for the application of United States law, Texaco's interest and control of its oil flow operation and its base of operation in New York should entitle the death claimants to application of the United States statutory Death Act in the New York forum.

There is not a word on the entire subject in the opinion of Magistrate Jacobs. The decision arrived at without any such consideration can only be error in failing to apply and give weight to the factor in reaching its conclusion since the available United States statute presents a far greater connection to the United States in requiring its interpretation and application by a knowledgeable local forum.

Gulf Oil v. Gilbert, 330 U.S. 501, spelled out the requirement to search the fact pattern of each case to determine whether the claimants' choice of forum was to be declined.

It would appear that the Court below abused its discretion in failing to apply the standards laid down by this Court and others in not taking into consideration the fact that the American statutory Death Act, 46 U.S.C. 761, et seq. was available to the death claimants and in not taking into account the settled policy of this Court that a local forum should apply and interpret local law whenever possible.

As such, the Magistrate and the Court below, not applying the proper standard needed to make a sound decision within their discretion, the order of dismissal should be reversed in order to return this matter to the local forum for interpretation of local law against local defendants.

POINT II

THE COURT BELOW ABUSED ITS DISCRETION IN DISMISSING THIS MATTER IN REFUSING TO PERMIT THE PLAINTIFFS TO CONDUCT DISCOVERY PROCEEDINGS (OTHER THAN TO OBTAIN ANSWERS TO SIX INTERROGATORIES AND THE PRODUCTION OF ONE DOCUMENT) TO GIVE THE PLAINTIFFS AN OPPORTUNITY TO ANSWER THE DEFENDANTS' MOTION BY CONDUCTING AN INQUIRY INTO THE DEFENDANTS' BASE OF OPERATIONS, TO SHOW THE COURT THAT NEW YORK AND ITS WITNESSES WAS THE PRIMARY SOURCE OF THE MATERIAL, RELEVANT EVIDENCE IN THE CASE.

Plaintiffs' position is and has always been that the seat of power of defendant (Texaco, the corporate parent is

actually the sole defendant) was in New York.

A major thrust of sought after information was directed to the question of authority and responsibility to make decisions for the defendant, who and in what capacity that authority reposed, where they were to be found, the information itself (since the assertion that a witness is important carries with it the duty to spell out the substance of testimony, Cox v. Pennsylvania, 72 F.Supp. 278), and inquiry into Texaco's corporate structure to establish the reign of the hierarchy in New York. There were other approaches taken toward obtaining documents (some of which plaintiffs know exist, others only belief that they do) to establish again that Texaco's base of operation and where Texaco failed to carry out its responsibility was in New York, where the Court below sits. Defendants' liability rests not on the collision with the PARACAS but in the succeeding 27 hours when the New York office was virtually paralyzed in failing to issue the order to hire the salvage vessel of Smit-Tak necessary to locate and mark the sunken hulls of the TEXACO CARIBBEAN as they floated below the surface of the Channel waters. Information in plaintiffs' possession indicates an offering by Smit-Tak to locate and mark, that the Trinity House vessel did not locate but marked an oil slick, that Texaco Overseas Tankship Limited (another wholly owned subsidiary of Texaco in London, TOT) (193a) received the offer from Smit-Tak and requested instruction from Texaco/New York about whether to hire the Dutch vessel to

mark, that some 27 hours passed without the issuance of any word from New York, that the BRANDENBURG crashed into the unlocated and unmarked sunken hull, with this consequent suit.

All of this information was given to the Court below, all was laid out in specific detail so that the Court would know and understand the importance of the New York office and the witnesses in that office and that the evidence of Texaco's liability had to come from New York and from nowhere else.

When Texaco and Texpan moved to dismiss under the doctrine of forum non conveniens, no answers had been served, hence no discovery had been started.

Upon receipt of the motion, Brandenburg and the death claimants:

1. On April 13, 1973 served interrogatories and requested discovery and inspection of documents;

2. On May 14, 1973, defendants objected to all interrogatories and that discovery was not warranged;

3. A reduced list of interrogatories (123a) and requests for discovery and inspection (132a) were served on June 7, 1973;

4. Defendant objected to all interrogatories and discovery on the ground that TOT, Texaco's London office, had all the information;

5. A reply affidavit by plaintiffs' attorneys stated that involved was the exclusive authority of Texaco/New York

officials to deal with the marking of the hull, that the interrogatories and discovery of documents were directed to that issue and to the issue of control of Texpan and TOT by Texaco/New York to determine where the witnesses to the suit on the question of liability of Texaco/New York in not authorizing the marking were to be found;

6. On July 25, 1973, Magistrate Jacobs' report (161a) limited discovery to six interrogatories, struck out all of the remainder, and permitted only portions of one request for documents. Further, although discussions during a prior conference referred to depositions of defendants' officers, no deposition was mentioned in the report;

7. Plaintiffs' attorneys objected to the limitation of interrogatories and discovery permitted and to the absence of any order permitting depositions (169a, 174a);

8. The report was confirmed by the Court below (176a);

9. Notice of deposition of the defendants...

> "by their respective Presidents, or by one or more Directors, Officers, or Managing Agents designated by each defendant having a knowledge of the names and addresses of the corporate officers and directors of the defendants, the position of each in said defendant or defendants; the location of the offices and principal place of business of the defendants and the authority, duties and responsibilities of each office; the relationship of the defendants each to the other, including stockholdings of each in the other, both in percentage of shares of the whole and in value,

> dual or common officers and directors, and all questions concerning the management, operation and control of the business of Texaco Panama Inc. by Texaco, Inc., including but not by way of limitation, the movement of vessels and more particularly, the TEXACO CARIBBEAN from the commencement of its voyage which culminated in the events, the subject of this lawsuit; as having knowledge of the location of witnesses, "documents", or other evidence in the possession of, known to or otherwise under the control of defendants Texaco, Inc. and Texaco Panama Inc., relating in any way to the location, marking and/or buoying of any part or portion of the wreck(s) of the M/V TEXACO CARIBBEAN." (186a) was served;

10. Notice to Admit (180a) that Texpan had an office in New York at Texaco's address during December 1967, and that during that month issued a letter on its stationery signed by John I. Mingay, Chairman of the Board of Directors of Texpan (and an officer of Texaco), to vessel owners of the Texpan fleet concerning authority and limitations of that authority of TOT and Texpan/New York;

11. Defendant objected to the Notice to Admit (184a);

12. Defendant answered the limited interrogatories (205a), admitting that "communications of an informal nature" of Smit-Tak's offer to mark the hull were received by John I. Mingay, Texpan's Chairman of the Board and a Texaco officer and by H. R. Christensen, a Texaco employee, both in New York. The previous production of the one Telex message referred to a prior message although the defendant produced the "one";

13. An Order to Show Cause to obtain the depositions of Mingay and Christensen (215a); for further answers to interrogatories and to overrule defendants' objections to the Notice to Admit was served;

14. Magistrate Jacobs' report (232a) denied plaintiffs' request for the depositions because "he is not positive that there is any real possibility that any and all depositions would yield anything of significance...", although he knew that they had received the informal message and were important and perhaps vital witnesses to the part played by the New York office and its officials during the 27 hour period between collisions. The failure to permit the depositions ended the possibility of obtaining the information, documents and witnesses available from the New York area;

15. The report was endorsed by the Court below (247a), excepting that the Notice to Admit was also quashed.

In the long course of this litigation involving a collision of two vessels (one likened to American), other vessels rescuing (one American), other vessels working to mark (one Dutch), offices of parties and witnesses in New York, London and Rotterdam, the total discovery permitted by the Court below, despite repeated request by the plaintiffs, was six interrogatories and one document produced. This, from 29 interrogatories and from 22 requests for documents. No depositions were permitted; Notice to Admit was not permitted which would have pinpointed the over-

all control by Texaco/New York of the Texaco fleet.

Plaintiffs have, in short, been dismissed substantially on affidavit, without hearings, without testimony, without depositions, without documents. This suit involving the United States defendant and with liability pinpointed to the failure of the inner-working operation of its New York office in failing to perform its duty to order its hull marked has now been dismissed without the opportunity to satisfy the Court below that there was a direct, substantial connection between Texaco/New York and the failure to properly safeguard shipping from the effects of the hull. Refusal to permit a showing of control and domination by Texaco/New York that would in turn have revealed the witnesses who could have been compelled to testify under subpoena from the Court below of the part played by the New York office in the failure to carry out its duty was error. Instead, plaintiffs are now faced with the awesome problem of establishing such liability in the Court in London. And, as stated in Brandenburg's Brief, all to what effect when the English law does not permit recovery in any event.

In matters of this general nature, and under a motion to dismiss, liberal discovery including depositions have uniformly been granted to at least give the plaintiffs a fair and reasonable opportunity to answer against a possible destruction of a suit, Park & Tilford v. Distillers, 19 F.R.D. 169, 171; Deep South v. Metropolitan, 21 F.R.D. 340; Chero v. Cia. Nav.

Hari, 15 F.R.D. 110; Seaboard v. Seaboard, 15 F.R.D. 40; Abrams v. Bendix, 40 F.R.Serv. 42; Blair v. Rubenstein, 20 F.R.Serv. 427, 428; Petroleum v. Stone, 18 F.R.Serv. 498.

See also: Monteiro v. San Nicholas, 254 F.2d 514, by this Court, with respect to a dismissal without a hearing.

The Court of Appeals for the Fourth Circuit in Lekkas v. M/V CALEDONIA, 443 F.2d 10, involving suit by Greek seamen against a flag of convenience ship railed against a dismissal by the lower Court without full discovery procedure. The dismissal was vacated, the Court holding:

> "In the exercise of sound discretion, a district court may decline jurisdiction of a suit in admiralty brought by foreign seamen against a foreign ship. But before acting, the district court should be fully informed about all factors that have a significant bearing on the question of retaining jurisdiction, including the allegiance of the shipowner....When the owner asked the court to decline jurisdiction, it subjected itself, its agents and those to whom it entrusted the vessel to the obligation of furnishing on request all pertinent information for decision of its motion."

The dismissal herein was by attorneys' affidavit that the witnesses were not available in New York and that they don't know anything. The corporate officers should have been deposed, the documents should have been produced, the admissions pressed, all to inform the Court where the evidence and witnesses who can provide material testimony concerning the issues of liability can be found. Then the Court could have ruled in its

sound discretion.

We now have defendants' attorneys' opinion that the witnesses to this suit are in England and that New York did not have authority concerning the duty to mark or information of the offer to do so by Smit-Tak. With all due respect, it simply "ain't so" and the Court below would have known it if the plaintiffs had been given the opportunity to obtain and provide the information.

POINT III

THE COURT BELOW ABUSED ITS DISCRETION IN DISMISSING THIS MATTER WITHOUT DEMANDING FROM THE DEFENDANTS THAT THEY IDENTIFY THE POSSIBLE ENGLISH WITNESSES HAVING KNOWLEDGE OF THE FACTS, THEIR AVAILABILITY AND WILLINGNESS TO TESTIFY AND THE SUBSTANCE OF THEIR TESTIMONY.

Historically, the concept of dismissal of a lawsuit timely brought and jurisdictionally proper has been cast with a long shadow to overcome the plaintiffs' choice of forum, Gulf Oil v. Gilbert, 330 U.S. 501. Aside from the factors of importance as laid down by the Supreme Court in Gulf Oil, supra, it has always been a matter of simple fair mindedness that no case shall be dismissed except on grounds that are fully known and understood by the Court and that the plaintiff shall have the opportunity to fully answer them. As such, the unproved allegation of inconvenience of witnesses as a ground for the dismissal of the suit

in the plaintiffs' choice of forum has never been found acceptable. The cases require that the moving party be put to the test of establishing that the defendant would be disadvantaged by retaining the local forum and that the plaintiff would not be by declining it. The failure by the Court below to do so being error and an abuse of discretion, this matter should be reversed by this Court.

The law requires not statements by attorneys to the effect that there are numerous witnesses in the alternate forum, but rather who they are by name and address, their availability and willingness to testify, the substance of the testimony and its qualitative value, United v. United States, 192 F.Supp. 795; Foster v. United States, 188 F.Supp. 389. The mere listing of names was held insufficient in United v. United States, supra, nor is it sufficient to simply state the number of witnesses, Chicago v. Hugh, 232 F.2d 584 (19C).

In Cox v. Pennsylvania, 72 F.Supp. 278 (DCNY), the Court denied a motion to dismiss, in part due to the failure of the moving party to support in detail the blanket assertion that the material witnesses were in the suggested alternate forum:

> "The court desires to call attention to the fact that the defendant in support of this motion makes a bald and general assertion that all of the material witnesses reside either in Pennsylvania or Illinois. This statement is not supported by any

> details. Thus, no names or addresses of the witnesses are given, or any statement as to what their testimoy would be. While this omission, in itself, seems to constitute sufficient ground for denial of the motion, especially in the light of the fact that the plaintiff names certain witnesses who reside in New York...."

See also: Lekkas v. M/V CALEDONIA, supra; Collins v. American Auto, 128 F.Supp. 228 (DCNY).

The Court below was flooded with tales of supposed witnesses, entire crews of ships that were in the area at one time or another, Italian seamen (unidentified by name) who were said to be witnesses in England, sheer throwing out of ship's names and crews without the slightest demand by the Court that the statements be substantiated.

The total result of what this Court will know concerning the identity of all of the witnesses that defendants say they believe to be important, from a reading of the entire record, is the following:

1. The affidavit of Robert R. Dimock in the moving papers (74a) states the witnesses to be (a) TOT employees, (b) the TEXACO CARIBBEAN crew, (c) the Trinity H use employees, (d) the fishing vessel crews of the ACCORD and VIKING WARRIOR, all of whom reside in England (in point of fact the Italian (73a) crew of the TEXACO CARIBBEAN do not reside in England. None are identified.

2. The affidavit of E. F. Pointon (79a) cites the same classes, again without any identification or information of how many of the groups would have any knowledge of the facts.

3. And in the affidavit of Cedric G. Harris, Solicitor (83a), the witnesses are the crew of the TEXACO CARIBBEAN, residing in Italy, available in England (how, not explained): employees of TOT; employees of Trinity House; crews of the ACCORD and VIKING WARRIOR; crew of the BRANDENBURG, residing in Germany, available in England; employees of the Ministry of Defense and of radio stations to verify the messages sent; crews of the PARACAS (South American); documents and radio logs.

None of the affidavits, nor that of defendants' attorney identifies in any way any of these important witnesses or gives any description whatever of their supposedly important testimony. On page 147a of the appendix, answers to interrogatories shows that no information was known of the crew of the TEXACO CARIBBEAN as witnesses.

The report of Magistrate Jacobs (162a) incorrectly states that the TEXACO CARIBBEAN crew resided in England. And still not a witness identified.

4. The affidavit of defendants' attorney mentions Capt. John L. Watson of TOT as a witness on the question of receipt of the offer from Smit-Tak to locate and mark the hull

(313a). Mr. Stern then discusses each class of witness (316a-318a), but again does not identify who and how many of each class have information, no names and not an inkling of what any of the testimony will be, or of the necessity for the testimony (316a).

However, Mr. Stern does suggest that the plaintiffs have "even failed to ascertain (a) the names of those crewmembers aboard the LESLIE LYKES who might have seen something and who might, therefore, be witnesses; (b) whether or not they are still aboard the LESLIE LYKES; (c) their availability for trial in the matter; (d) the substance of the testimony that they could be expected to give; (e) their willingness to testify in the matter".

The refusal to provide any names of its TOT witnesses and the substance of their testimony continued (318a), although demanded by plaintiffs' attorneys (350a-355a).

In short, the Magistrate and Court below rendered a decision herein without any idea of just what witnesses are available, their ability and willingness to testify, what the testimony will be, its importance and materiality. Paraphrasing Mr. Stern, what are the names of those persons who might have seen something or who know something and who might, therefore, be witnesses; whether or not they are still with their employers; their availability for trial in the matter; the substance of their testimony that they could be expected to give; their willingness

to testify (315a).

Plaintiffs have been dismissed by affidavit, and patently so when seen in the light of Magistrate Jacob's report, which does not set forth the name of a single witness or expected witness or show any detail of the testimony to come, or the reason for its importance (364a, 365a, 377a). The record is totally silent on what has been characterized as required, in Cox v. Pennsylvania, supra, in order to assure that the parties receive a fair hearing on motion of this drastic nature.

That concept of fair mindedness that no case shall be dismissed except on grounds fully known and understood has not been met by Magistrate Jacobs and the Court below.

CONCLUSION

The Court below abused its discretion and erred in failing to give any weight to the concept that an American forum is better able to serve the ends of justice to the parties in a matter governed by a United States statute; in failing to permit liberal and full discovery so as to allow the plaintiffs the opportunity to defend their position on a motion to dismiss; in failing to demand from the moving party the names of the expected witnesses who have knowledge of the facts, their availability and willingness to testify, and the substance of their testimony.

For the above reasons, the dismissal should be reversed so that this properly jurisdictioned suit can go forward on its merits.

Respectfully submitted,

HARVEY GOLDSTEIN and
FUCHSBERG & FUCHSBERG
Attorneys for the Death Claimants
250 Broadway
New York, New York 10007
(212) WO 2-2800

HARVEY GOLDSTEIN,
On the Brief.

SERVICE OF THREE (3) COPIES OF THE WITHIN

IS HEREBY ADMITTED

THIS 30 DAY OF July 1974

Attorney(s) for

COPY RECEIVED BY
MANAGING ATTORNEY'S OFFICE
HAIGHT, GARDNER, POOR & HAVENS
1974 JUL 30 PM 3:48

atty's for

RECEIVED
JUL 30 1974
POLES, TUBLIN
PATESTIDES & STRATAKIS

Attorney for Stans, et al
3:30 pm

78 Lex Printing Company, Inc., 421 Hudson St., N.Y. 10014—691-8360